INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Contract provision involved	2
Statement	3
Reasons for granting the writ	7
Conclusion	16

CITATIONS

Cases:

Bein v. *United States*, 101 C. Cls. 144	10, 13
Beuttas v. *United States*, 101, C. Cls. 748, reversed, 324 U. S. 768	8
Blair v. *United States*, 99 C. Cls. 71, reversed 321 U. S. 730	8
Burchell v. *Marsh*, 17 How. 344	10, 12, 14
Callahan Walker v. *United States*, 95 C. Cls. 314, reversed, 317 U. S. 56	8
Chicago & Santa Fe Railroad v. *Price*, 138 U. S. 185	10, 12
Elliott v. *Missouri K. & T. Ry. Co.*, 74 Fed. 707	13
Great Lakes Dredge and Dock Company, The v. *The United States*, No. 45658, decided June 5, 1940 (slip opin., pp. 4-5)	9
Holpuch v. *United States*, 104 C. Cls. 254, reversed, 328 U. S. 234	8
Kihlberg v. *United States*, 97 U. S. 398	10, 12
Knox v. *Symmonds*, 1 Ves. Ch. Rep. 369	10, 12
Martinsburg & Potomac R.R. Co. v. *March*, 114 U. S. 549	8, 10, 12, 13, 14
McShain v. *United States*, 88 C. Cls. 284, reversed *per curiam*, 308 U. S. 512	8
Merrill-Ruckgaber Co. v. *United States*, 241 U. S. 387	10
Moorman v. *United States*, 113 C. Cls. 159, reversed, 338 U. S. 457	8
Mundy v. *Louisville & N. R. Co.*, 67 Fed. 633	10
National Labor Relations Board v. *Pittsburgh Steamship Co.*, 337 U. S. 656	16
Plumley v. *United States*, 226 U. S. 545	10
Ranger v. *Great Western Railway Co.*, 5 HL Cas. 72	10
Ripley v. *United States*, 220 U. S. 491	14
Ripley v. *United States*, 222 U. S. 144	14
Ripley v. *United States*, 223 U. S. 695	10, 12
Sweeney v. *United States*, 109 U. S. 618	10
United States v. *Blair*, 321 U. S. 730	11

Cases—Continued

	Page
United States v. *Callahan Walker Co.*, 317 U. S. 56	15
United States v. *Causby*, 328 U. S. 256	15
United States v. *Esnault-Pelterie*, 299 U. S. 201; 303 U. S. 26	15
United States v. *Gleason*, 175 U. S. 588	10, 13, 14
United States v. *Holpuch*, 328 U. S. 234	11
United States v. *Mason & Hanger Co.*, 260 U. S. 323	10
United States v. *McShain, Inc.*, 308 U. S. 512	10
United States v. *Moorman*, 338 U. S. 457	6, 7, 8, 10, 12

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 170

THE UNITED STATES, PETITIONER

v.

PENNER INSTALLATION CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on April 3, 1950.

OPINIONS BELOW

The original opinion of the Court of Claims (R. 23-25) is reported at 114 C. Cls. 571. The supplemental opinion of the Court of Claims (R. 26-31) is reported at 89 F. Supp. 545.

JURISDICTION

The original judgment of the Court of Claims was entered on October 3, 1949 (R. 26). The Gov-

ernment's motion for a new trial, seasonably filed, was denied on November 7, 1949 (R. 26). The Government's motion for leave to file a second motion for new trial was allowed on December 19, 1949 (R. 26). On April 3, 1950, the Court of Claims granted the Government's motion for a new trial, withdrew its judgment of October 3, 1949, and entered a new judgment (R. 31). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the decision of a designated agent of the Government on disputes arising out of a contract, which decision the contract provides "shall be final and conclusive upon the parties thereto", may be set aside as "arbitrary, capricious or so grossly erroneous as necessarily to imply bad faith" on the basis of (1) an assumed presumption that the decision lacked impartiality because the designated agent was an employee of one of the parties to the contract and (2) the finding, predicated solely on the evidence before the court without reference to the evidence before the designated agent when he made his decision, that the decision was erroneous.

CONTRACT PROVISION INVOLVED

Article 15 of the contract provides:

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this con-

> tract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decisions shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

STATEMENT

Penner Installation Corporation, respondent herein, instituted this proceeding in the Court of Claims seeking to recover $20,139.59 on a number of claims arising under a unit-price contract, which it had entered into with the Civil Aeronautics Board for furnishing certain materials and performing certain installation work for an airport lighting system at Port Erie Airport, Erie, Pennsylvania. In its complaint, respondent alleged that the claims asserted had been presented to the contracting officer and duly appealed to the Secretary of Commerce, but "that the defendant has failed and refused to pay said claims" (R. 3). Respondent, however, made no allegation that the actions of the contracting officer and the Secretary of Commerce, in rejecting its claims, were arbitrary, capricious or so grossly erroneous as to imply bad faith.

In its special findings, the Court of Claims found, *inter alia*, that pursuant to Article 15 of the contract (*supra*, pp. 2-3), respondent submitted to the contracting officer an itemized statement of the

amount claimed to be due (R. 16). The contracting officer granted an allowance on a few of the claims and rejected the remainder which included the items of claim involved in the suit. On appeal by the respondent, the Secretary of Commerce sustained the decision of the contracting officer (R. 16). The court, however, made no finding as to whether the actions of the contracting officer and the head of the department were arbitrary or so grossly erroneous as necessarily to imply bad faith nor did it make any subsidiary finding as to what evidence was before these officers at the time they acted. Instead, the court below made findings on the merits of the claims. The court agreed with the administrative disposition of some of the claims, and refused to allow recovery thereon (R. 24-25). On ten claims, however, the court found that it disagreed with the administrative disposition thereof.[1] On the basis of this disagreement,

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[1] The substance of the court's findings on the eight claims on which it ultimately awarded damages to respondent follows:

(1) On the 6″ x 18″ trench, the court found that the evidence before it established that respondent had excavated a total of 27,296 lineal feet, that respondent had been paid for only 23,855 lineal feet, an underpayment of 3,441 lineal feet, and that $447.33 was due respondent (R. 17).

(2) On cable trench in excess of 6″ x 18″, the court found on the evidence before it that respondent excavated 629 cubic yards, which is 426 cubic yards more than the 203 for which respondent was paid. $2,130.00 was held to be due respondent (R. 17).

(3) On cable in trench, the court found that on the evidence before it 35,071 feet was actually placed. Since

the court initially held that the sum of $3,810.42 was due respondent (R. 25) and entered judgment for that amount (R. 26). In its opinion, the court stated (R. 24):

> We find it unnecessary to comment on each and every item. Suffice it to say that we have carefully reviewed the commissioner's report and the exceptions thereto taken by both the

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respondent was paid for only 34,395 feet, the court held that respondent was entitled to payment for 676 feet and awarded $13.52 (R. 18).

(4) The court awarded respondent $16.00 for one of the cable splices for which respondent had not been paid. The other five cable splices were, the court found, caused by respondent's own fault (R. 18).

(5) On driving conduit under road, the court found that respondent had submitted a price of $32.00 per lineal foot, but later formally agreed to do the work for $6.00 a foot. Although the respondent was claiming $35.80 a foot and the CAB had fixed a price of $4.00 a foot, the court held that $8.00 was a fair and reasonable price and awarded $400.00 (R. 18-19).

(6) On furnishing and installing wood poles, the court found that respondent originally bid $70.00 a pole, but reduced it to $35.00 a pole at the Government's request when told that no poles would be required. Subsequently, respondent was directed to furnish 12 poles varying in length between 18 and 30 feet. The court further found that under the winter conditions under which the work was done, a fair price was $70.00 a pole and awarded $420.00 (R. 19).

(7) On the 1¼" conduit, the court found that respondent installed 150 feet of 1¼" conduit but was paid for 1" conduit, in accordance with the contract, and awarded $7.15. The court further found that a total of 490 feet was installed but respondent was paid for 469 feet. The court awarded $13.76 for the additional 21 feet (R. 20-21).

(8) On supporting steel bands, the court found on the evidence before it that respondent procured and installed 12, rather than the six bands for which it had been paid, and awarded $18.00 for the unpaid six bands (R. 21).

> plaintiff and the defendant, and, except in the instances noted below, we are of the opinion that the weight of the evidence is not against the commissioner's finding, and we have, accordingly, adopted his findings, with only minor exceptions.

The Government's motion for a new trial called the court's attention to the fact that its allowance of recovery conflicted with the provisions of Article 15 since there was no finding that the decision of the head of the department on these claims was arbitrary, capricious or so grossly erroneous as necessarily to imply bad faith. That motion was denied on November 7, 1949 (R. 26). Subsequently on December 19, 1949, the court below granted the motion of the United States for leave to file a second motion for new trial, in which it was urged that this Court's disposition of *United States* v. *Moorman*, Oct. Term, 1949, No. 97, which was then pending on writ of certiorari would control here (R. 26). This Court entered its opinion in the *Moorman* case, 338 U. S. 457, on January 9, 1950. The court below, on April 3, 1950, withdrew its original judgment and granted the Government's motion for a new trial (R. 31). In its supplemental opinion simultaneously entered, the court, without further proceedings, reaffirmed its original judgment, except with regard to two claims involving extras not ordered in writing, thus allowing respondent to recover $3,465.76 (R. 31).

The court concluded its opinion by amending its findings to add a new finding (R. 31);

> 22. The decisions of the contracting officer and the head of the department on plaintiff's claim were arbitrary and so grossly erroneous as to imply bad faith.

REASONS FOR GRANTING THE WRIT

In *United States* v. *Moorman*, 338 U. S. 457, 462, this Court stated that an agreement between contracting parties "to submit their contractual disputes to final determination outside the courts" should not "be frustrated by judicial 'interpretation' of contracts. If parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government." So reasoning, this Court upheld the finality of an administrative ruling on a dispute under a government contract, noting that it had been represented to the Court, in the Solicitor General's petition for certiorari, that the Court of Claims' decision in *Moorman* plus previous decisions had " 'weakened and narrowed the effectiveness of the well-established policy of the Government to settle, without expensive litigation, disputes arising under contracts'; and that the total effect of the decisions was to 'add further doubt and confusion to the authority of designated officers of the United States

to make final decisions under government contracts.' " 338 U. S. at 460.[2]

In *Moorman*, this Court recognized that the contractually designated agent's findings could, of course, be " 'impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith.' "[3] And so, within three months of this Court's *Moorman* decision, the Court of Claims, in reconsidering the case at bar, seized upon the exception to the rule of administrative finality, having initially ignored the rule altogether, despite the facts (1) that no issue as to the question of fraud or such gross mistake as necessarily implied bad faith was presented by the pleadings, (2) the case was not tried upon such issues, and (3) no finding was made as to the evidence upon which the contracting officer and the Secretary of Commerce acted.

The Court of Claims, in this case, found no actual bias. But, it said (R. 28-29), "In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, the correctness of his findings, his relation-

[2] See, *e.g.*, *McShain* v. *United States*, 88 C. Cls. 284, reversed *per curiam*, 308 U. S. 512, 520; *Callahan Walker* v. *United States*, 95 C. Cls. 314, reversed, 317 U. S. 56; *Blair* v. *United States*, 99 C. Cls. 71, reversed, 321 U. S. 730; *Beuttas* v. *United States*, 101 C. Cls. 748, reversed, 324 U. S. 768; *Holpuch* v. *United States*, 104 C. Cls. 254, reversed, 328 U. S. 234; *Moorman* v. *United States*, 113 C. Cls. 159, reversed, 338 U. S. 457.

[3] Quoting from *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 555.

ship to the parties, the allegiance he avows, and the duties his employment by one of them casts upon him." And in considering these factors, the court concluded that a finding of bad faith was required in this case.

The Government believes it to be demonstrable that this formula, as given practical application in this case, converts what was intended as an exception to the rule of administrative finality into the prevailing rule. If the decision below is permitted to stand, there is every reason to anticipate a recurrence of the situation which led this Court to grant certiorari in the *Moorman* case. See *supra*, pp. 7-8.[4] If that is so, this Court, in the exercise of its supervisory powers, should grant certiorari in this case.

1. Since the designated agent in the government contract is employed by the Government, owes allegiance to the Government, and the duties of his employment require him to protect the interests of the Government, the decision below effectively creates a presumption that the designated agent acted in bad faith, a presumption which can be rebutted only if his decision is found to be correct by the Court of Claims on the evidence before it. But it has long been established that the fact

[4] That the instant case marks the beginning of a line of cases, in which the doctrine herein announced will be applied, is evidenced by the opinion of the court below in *The Great Lakes Dredge and Dock Company* v. *The United States*, No. 45658, decided June 5, 1940 (slip opin., pp. 4-5).

that the person designated to decide the disputes arising under the contract is an employee of one of the parties to the contract does not entitle his decisions to any less finality than that accorded decisions of designated agents not so employed. *United States* v. *Moorman*, 338 U. S. 457, 461. See, aso, *Kihlberg* v. *United States*, 97 U. S. 398; *Sweeney* v. *United States*, 109 U. S. 618; *United States* v. *Gleason*, 175 U. S. 588; *Ripley* v. *United States*, 223 U. S. 695; *Plumley* v. *United States*, 226 U. S. 545; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387; *United States* v. *McShain, Inc.*, 308 U. S. 512, 520; cf. *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, 326; *Burchell* v. *Marsh*, 17 How. 344; *Knox* v. *Symmonds*, 1 Ves. Ch. Rep. 369. No such differentiation is made where the Government is not a party to the contract (see *Martinsburg & Potomac RR. Co.* v. *March*, 114 U. S. 549; *Chicago & Sante Fe Railroad* v. *Price*, 138 U. S. 185; *Mundy* v. *Louisville & N. R. Co.*, 67 Fed. 633, 644 (C. A. 6); *Ranger* v. *Great Western Railway Co.*, 5 HL Cas. 72) and there is even less basis for such a distinction when the Government is a contractual party. There, unlike the arbiters in purely private contracts, the designated agents "are also public officials who, as such, are presumably worthy of trust, and they have no financial interest in the questions which may arise under the contract which interest would cause them not to be impartial." *Bein* v. *United States*, 101 C. Cls. 144, 168 (Madden, J. concurring).

Moreover, the court below erroneously assumes throughout its opinion that the decision of the contracting officer controls. But Article 15 clearly provides for an appeal from the contracting officer's decisions to the head of the department, and it is the latter's decisions to which finality attaches. The head of the department, in contrast to the contracting officer, is not immediately concerned with the day by day performance of the contract and is in a position to take a more objective view of the merits of the dispute. It is because of this very reason that Article 15 requires an appeal to the department head. *United States* v. *Blair*, 321 U. S. 730, 734-737; *United States* v. *Holpuch*, 328 U. S. 234, 239-240.

In addition, the presence *vel non* of mere error in the designated agent's decision is irrelevant in determining whether to accord it finality. Were the decision to be final only if correct, there would be little purpose in including the finality provision in the contract, for then it would not operate to reduce the volume of potential litigation which would result from such disputes. As this Court has long recognized, it is plainly contemplated by the finality provision that the designated agent would make erroneous rulings but that mere error would not be sufficient to warrant denying finality thereto. "* * * it was expressly stipulated that the [designated agents'] determination should be final and conclusive. Neither party reserved the right to revise that determination for mere

errors or mistakes upon his part." *Martinsburg & Potomac RR. Co.* v. *March,* 114 U. S. 549, 554; *Chicago & Sante Fe Railroad* v. *Price,* 138 U. S. 185, 193; *Ripley* v. *United States,* 223 U. S. 695, 704; *Burchell* v. *Marsh,* 17 How. 344, 349-350; *Knox* v. *Symmonds,* 1 Ves. Ch. Rep. 369.

Finally, the ruling below ignores the plain language and obvious intent of the finality provision, which as it stands, makes binding all decisions of the designated agent. Subject to the "arbitrary or capricious" limitation, such provisions, it has long been established, are valid and enforceable; "parties competent to make contracts are also competent to make such agreements." *United States* v. *Moorman,* 338 U. S. 459, 461. In addition, the finality provision is of great value to the Government and "it is not at all certain that the government would have given its assent to any contract which did not confer upon one of its officers the authority [to make binding decisions]." *Kihlberg* v. *United States,* 97 U. S. 398, 401. Clearly therefore this Court in using the strong language of "arbitrary," "capricious" and "so grossly erroneous as necessarily to imply bad faith" regarded the limitation as one to be invoked but sparingly,[5] and not to be used as an easy

[5] "If a court in which the contractor seeks relief can justify its taking hold of the case only by applying such strong language as 'arbitrary,' 'capricious,' 'so grossly erroneous as to imply bad faith,' then the contractor has a nearly impossible burden if he seeks relief in court. Public officials who become heads of departments and contracting officers are only rarely

formula permitting the contractor to avoid the terms of his bargain. Courts are "competent to go back of the judgment of the [designated agent] * * * only * * * upon allegation and proof of bad faith, or of mistake or negligence so great, so gross, as to justify an inference of bad faith." *United States* v. *Gleason*, 175 U. S. 588, 607; see, also, *Martinsburg & Potomac RR. Co.* v. *March*, 114 U. S. 549, 553, 555; *Elliott* v. *Missouri, K. & T. Ry. Co.*, 74 Fed. 707, 711 (C. A. 8).

2. (a) It is obvious that the finding of such "gross error" in disposing of a dispute, which error "necessarily" gives rise to the inference of bad faith on the part of the designated agent, must be predicated upon an appraisal of the evidence which the agent had before him at the time he acted. That evidence may be either more, less or completely different from that which is before the court. A man cannot act in bad faith by failing to accord weight to evidence which he never saw or heard; likewise the reviewing court is not in a position to conclude that the agent's decision was so grossly erroneous as necessarily to imply bad faith if the evidence upon which the agent based his decision is unknown to the court. Here the

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guilty of conduct which merits such language of condemnation. Hence, unless courts merely use the strong language when in fact they mean something else, as, e.g., that they are unable to see any evidence of any substantial weight to sustain the official's decision, the administrative determination under Article 15 is final in practically all cases." Madden, J. concurring in *Bein* v. *United States*, 101 C. Cls. 144, 168.

court below failed to make any finding whatsoever as to the evidence before the designated agent.[6] In so doing it ignored the decision of this Court in *Ripley* v. *United States*, 220 U. S. 491. There, although the Court of Claims had found that the Government's designated agent had improperly refused to allow the imposing of crest rocks on a jetty at a time when "it was manifest" that the conditions for performing that work were satisfied, this Court returned the record to the Court of Claims "to explicitly find whether or not that which [the court] states was manifest was or was not known to the inspector." 220 U. S. at 496. See, also, *Ripley* v. *United States*, 222 U. S. 144, 147-148; *Burchell* v. *Marsh*, 17 How. 344, 349-350. Similarly, had the court below here tested the designated agent's rulings against the matters known to him, the court might well have concluded that his rulings were not so grossly erroneous as to warrant implying bad faith, notwithstanding the fact that these rulings might have so seemed in the light of the more elaborate and possibly different evidence before the court.

(b) Even on the basis of the findings of the court below and without considering either the evidence before it or before the Secretary of Com-

[6] Indeed, it is doubtful if it could have done so. No allegation of bad faith was made by respondent in its petition and the case was not tried on that theory. This underscores the necessity of alleging bad faith as stressed by this Court in *United States* v. *Gleason*, 175 U. S. 588, 607, and *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553.

merce, the decision below as to bad faith in respect of at least five items is erroneous as a matter of law. In respect of those items the court below admitted, in its opinion, that they were small in amount and "give no indication of arbitrary action on the part of the contracting officer" (R. 30). In so far as the other three items are concerned, the court concluded from its findings that the contracting officer "did not act as an impartial, unbiased arbiter and that his decisions, therefore, must be held to have been * * * lacking in that good faith required of an unbiased, impartial arbiter."[7] The court then proceeded to apply a wholly novel theory of "guilt by association". It stated that "we are convinced that the biased attitude, which was evident in the circumstances which we have cited, affected his decision upon all the items of the claims" (R. 31).

Apart from the fact that there is nothing in the court's findings to support this statement in the opinion (*United States* v. *Callahan-Walker Co.*, 317 U. S. 56, 59; *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205-206; 303 U. S. 26, 28-29; *United States* v. *Causby*, 328 U. S. 256, 267-268),

[7] Should certiorari be granted, we will demonstrate that even on the basis of the court's findings on these three items, there is no showing of such gross error as to imply bad faith. Thus in respect of the conduit under 12th Street and Ford Avenue, the respondent had submitted a price of $32.00 per lineal foot, had later agreed to accept $6.00 and was ultimately paid $4.00. The court below fixed a price of $8.00. Even in the absence of the evidence before the designated agents, it is apparent that their conduct in this respect falls far short of establishing gross error.

the court's refusal to accept the designated agent's rulings on the three items is, as we have already noted, based not on actual bias, but an imputation of bias or bad faith derived from the errors in regard thereto which it found he had committed. Assuming that the errors in the three items were so gross as to warrant an imputation of bad faith, it does not follow that such implied bad faith permeated the five claims as to which such gross error was not found to have been committed. On the contrary, the designated agent, far from rejecting all, allowed some of respondent's claims (cf. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U. S. 656) and the court below recognized the propriety of these rejections by itself denying recovery on the bulk of the claims asserted. By entering judgment for respondent for only about $3,500 in the face of respondent's claim for about $20,000, the court below made it manifest that the court itself did not believe that the designated agent's "bias" tainted all his actions on respondent's claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1950.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term—1950

No. 170

THE UNITED STATES,

Petitioner,

—v.—

PENNER INSTALLATION CORPORATION.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX OF TABLE OF CASES CITED

	PAGE
Chesapeake & Potomac Telephone Co. v. U. S., 281 U. S. 385	4
Luckenback S. S. Co. v. U. S., 272 U. S. 533	3
U. S. v. Causby, 328 U. S. 256	3
U. S. v. Esnault-Pelterie, 303 U. S. 26	2